No. 83-1734

IN THE

Supreme Court of the United States

October Term, 1983

JOHN R. BALELO, et al.,

Petitioners,

v.

MALCOLM BALDRIGE, Secretary of Commerce of the United States, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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1. The government would have the Court believe that this case merely involves "the application of undisputed legal principles to a unique factual situation" (Gov't. Brief in Opp. 9). The seven appellate opinions rendered in this case, and the disagreement reflected in them, belies the government's contention. Regardless of how one characterizes the factual situation, the legal principles at issue here are in sharp dispute and present fundamental questions under the Fourth Amendment, questions that transcend the factual setting in which they arise.

The government itself admits as much: In seeking to avoid further review, the government argues that it is unnecessary for Congress to authorize warrantless searches and that the executive branch may, by

regulation, bestow upon itself the power to search without a warrant whenever it seeks to do so and under whatever restrictions it deems appropriate. (Gov't. Brief in Opp. 17-18.) The decisions of this Court under the Fourth Amendment are firmly against such an extraordinary arrogation of executive power, as we discussed in our Petition (Pet. for cert. 9-10, 13-18.) Once before the executive branch advanced such a position and the Court answered thusly: "But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionality sensitive means in pursuing their tasks." *United States v. United States District Court*, 407 U.S. 297, 316 (1972).

2. Citing *Oliver v. United States*, 52 U.S.L.W. 4425 (April 17, 1984), the government contends that the monitoring of activities by government agents stationed aboard tuna vessels for the purpose of gathering evidence of criminal conduct does not involve a search. (Gov't. Brief in Opp. 12-16.) But *Oliver* neither addresses nor affects the issues presented by this case.

First, the basis of the Court's decision was that the "open fields" are not within the class of places and things specifically enumerated in the Fourth Amendment, namely "persons, houses, papers and effects." (52 U.S.L.W. 4427.) The Court noted that "effects" encompass personal property and not realty. By contrast, this case involves fishing vessels, which are not only the fishermen's home at sea, but also personalty, and thus within the class of objects protected by the Fourth Amendment.

Second, *Oliver* entailed only a brief, transitory entry by police officers upon the wooded hinterland beyond a residence. Neither *Oliver* nor any other case cited by defendants involved a 90-day encampment on the premises by government agents to conduct extensive surveillance of the activities of the owners. In order to equate *Oliver* to this case, one would have to posit a situation in which the police officer takes up residence in the farm house, eats his meals in the family dining room, and conducts a three month surveillance of the premises through the living room window. The government agents here, like the police officer in the example above, are not monitoring activities from the vantage point of a member of the public. *See, Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315 (1978).[1]

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[1] The government argues (Gov't. Brief in Opp. 13) that the fishermen welcome the intrusion of agents as scientific observers, and indeed champion

(Continued on page 3)

If the administrative stationing of government surveillance agents aboard fishing vessels is not a search, there is nothing to prevent any agency from placing an agent aboard every vessel flying the United States flag or departing a domestic port to enforce any of the myriad laws related to shipping, from maritime safety to oil pollution. There is no basis in law or logic for treating vessels as "open fields," ineligible for Fourth Amendment protection.

3. In addressing the statutory search and seizure standard of the MMPA, 16 U.S.C. § 1377(d)(2) (Pet. for Cert. 11-12), the government does not seek to defend the *en banc* majority's rationale based upon the "other authority conferred by law" language. (Gov't. Brief in Opp. 10-11.) Rather, it offers two new avenues for avoiding the prohibition against warrantless searches which are not based upon reasonable cause.

First, the government points out that 16 U.S.C. § 1377(d)(2) applies to all vessels and conveyances under the Act, whereas the regulation applies only to "certificated vessels" fishing for tuna or porpoise, and that the statute covers a broader spectrum of searches than the regulation contemplates. This distinction is meaningless: it merely emphasizes that the general rule includes a variety of different particulars.

(Footnote 1 continued from page 2)

observer data over all other in a lawsuit now pending in the Ninth Circuit, *American Tunaboat Association v. Baldrige*, No. 82-5588. It is true that before the agency transformed hitherto pure scientists into government informants in 1977, the fishermen willingly accepted them on their vessels. The nature of their intrusion changed drastically, however, when scientific study became criminal surveillance. The government distorts the American Tunaboat Association suit. Despite the fact that the principal jusitification for the observer regulation is the gathering of essential scientific data, in 1980 the government sought to *eliminate* use of observer data in estimating porpoise school size. The administrative law judge castigated the agency for spending years gathering observer data only to cast it aside as unreliable when the results did not fit preconceived theories. See, Recommended Decision of A.L.J. Dolan (July 18, 1980), *In the Matter of Proposed Regulations to Govern the Taking of Marine Mammals Incidental to Commercial Fishing Operations*, U.S. Department of Commerce, Docket No. MMPAH 1980-1, pp. 5-9. The suit by The American Tunaboat Association is not inconsistent with plaintiffs' statutory and constitutional objections to the regulation here. It simply maintains that the government may not blow hot and cold with observer-gathered data, using it when convenient and ignoring it when not.

Second, the government claims there is no inconsistency between a warrantless observer stationing and the statute's search and seizure standard because Congress specifically provided a limited observer program for research and development between 1972 and 1974 in 16 U.S.C. § 1381(d). (Gov't. Brief in Opp. 11, fn. 3.) On the contrary, the fact that Congress found it necessary to provide specific statutory authority for observer stationing during the first two years of the Act reflects an awareness that such stationing would otherwise be prohibited by the search and seizure provision of § 1377(d)(2), which was designed to be a permanent fixture of the Act.

4. The government invites the Court to "balance" the need to search against the invasion which the search entails (Gov't. Brief in Opp. 16), thus repeating the flawed analysis of the *en banc* majority. The Court has indeed employed such a balancing test in determining the reasonableness of a variety of "stop," or seizure of the person, procedures which (unlike a search) do not implicate the warrant clause of the Fourth Amendment. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 16, 20 (1968) (stop and frisk); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 881 (1975) (roving patrol stops); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-8, 561 (1976) (fixed check-point stops); *Delaware v. Prouse*, 440 U.S. 648, 653-5 (1979) (random driver's license stops); *United States v. Villamonte-Marquez*, 51 U.S.L.W. 4812, 4814 (1983) (Custom's boarding of moored vessel in sea channel).

However, the reasonableness of a search under the Fourth Amendment does not admit of a simple balancing analysis. Rather, the initial inquiry is always whether there was a warrant or a recognized exception to the warrant clause. *Camara v. Municipal Court*, 387 U.S. 523, 528-9 (1967); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-5 (1971); *United States v. United States District Court*, 407 U.S. 297, 315-18 (1972); *Delaware v. Prouse*, 440 U.S. 648, 654 fn. 11 (1979).

Exceptions to the warrant clause depend upon "whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara*, at 533; *Schmerber v. California*, 384 U.S. 757, 770-771 (1966).

As our Petition demonstrates (Pet. for Cert. 16-17), an essential requirement of the so-called pervasively regulated industry exception, upon which the government relies, is a determination that obtaining a warrant would frustrate inspection. The government, like the *en banc* majority,

totally ignores this requirement and focuses instead on the need to have observers aboard tuna vessels (as opposed to the necessity that their stationing be warrantless), and the alleged superiority of the agency's notice procedures to a warrant (Gov't. Brief in Opp. 16-18), factors which in and of themselves have never justified a warrantless search.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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June 1984